Ang Tuan Hock v Lim Keng Thean & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-02–3744 OF 2010
SYED AHMAD HELMY, CLEMENT SKINNER AND MAH WENG KWAI JJCA
17 OCTOBER 2012

Contract — Friendly loan — Security — Original copy of issue document tittle of piece of land and memorandum of transfer held as security — Clause in agreement stipulating title deed would not be presented for registration of change of ownership of land unless failure to repay loan within one year from agreement date — Extension of loan for another year — Discovery that ownership of land transferred six weeks after signing loan agreement — Whether there was fraudulent act

The appellant and the first respondent had entered into a written loan agreement where the latter agreed to lend the sum of RM100,000 with 3% interest per month, as a friendly loan to the former. The loan sum was to be repaid within a year from the date of the loan agreement on 5 February 2001. As security for the loan, the appellant deposited the original copy of the issue document of title of a piece of land of which he was the registered owner, together with a memorandum of transfer ('MOT') duly signed by the appellant. Clauses 2 and 4 of the loan agreement stipulated that the MOT and the title deed would not be presented for registration of change of ownership of the land unless the appellant failed to repay the said loan 'within 1 year with effect from the date of this agreement'. Before the expiry of the one year period, the appellant requested for an extension of another year to settle the loan sum. According to the appellant, he had paid all the monthly interest payments in cash to the first respondent personally in the sum of RM210,000 and requested for the return of the title deed and MOT from the second defendant. However, the documents were not returned to the appellant. On 17 November 2004, the appellant made a search at the land office and discovered that ownership of the said land had been transferred and registered in the name of the first respondent on 18 March 2001, six weeks after the loan agreement had been signed on 5 February 2001. In his claim, the appellant pleaded fraud and sought for damages against the first respondent. The High Court dismissed the appellant's claim and held that the appellant failed to prove fraud against the first respondent and that the transfer of ownership effected by the first respondent was not a fraudulent act. Hence, the present appeal.

Held, allowing the appeal:

(1) The first respondent had effected the transfer and registration of

ownership of the land into his own name about six weeks after the date of execution of the loan agreement. This act was clearly in breach of the loan agreement and in blatant disregard of the provisions in cll 2 and 4 of the loan agreement, regardless of whether the appellant was in breach of his obligation to pay interest to service the loan at the material time. This was simply because the first respondent had allowed the appellant a period of one year to repay the loan and that in the meantime, no transfer of ownership of the land could be effected. This clearly demonstrated a fraud perpetrated by the first respondent on the appellant. It was obvious that the judicial commissioner ('JC') had erred in law when she failed to consider and hold that the first respondent had perpetrated a fraud on the appellant when the first respondent caused the transfer of ownership of the land to himself prematurely (see para 22).

(2) The findings of the JC, inter alia, that the appellant had failed to prove that he had paid the interest payments to the first respondent or that he had repaid the loan sum to the first respondent directly, but instead had held that the money was paid to the second defendant, did not detract from the fact that the first respondent had no right or legal basis to effect the transfer of ownership of the land to himself before the expiry of the one year period. The early transfer of the ownership of the land was not considered at all by the JC and was accordingly an error of law which error had to be corrected by appellate intervention (see para 22).

[Bahasa Malaysia summary

Perayu dan responden pertama telah memasuki perjanjian pinjaman bertulis di mana responden pertama bersetuju untuk meminjamkan sejumlah RM100,000 dengan faedah 3% setiap bulan, sebagai pinjaman persahabatan kepada perayu. Jumlah pinjaman tersebut dikehendaki dibayar balik dalam masa setahun dari tarikh perjanjian pinjaman pada 5 Februari 2001. Sebagai jaminan untuk pinjaman, perayu mendepositkan salinan asal pengeluaran hak milik sebidang tanah yang mana dia adalah pemilik berdaftar, bersama memorandum pindaan ('MOT') yang ditandatangani oleh perayu. Klausa 2 dan 4 perjanjian pinjaman menetapkan bahawa MOT dan surat ikatan hak milik tidak akan dikemukakan untuk pendaftaran pertukaran pemilik tanah kecuali perayu gagal untuk membayar balik pinjaman tersebut 'within 1 year with effect from the date of this agreement'. Sebelum tamat tempoh satu tahun, perayu memohon untuk pelanjutan setahun lagi untuk menyelesaikan jumlah pinjaman tersebut. Mengikut perayu, dia telah membayar kesemua bayaran faedah bulanan dalam tunai kepada responden pertama secara peribadi dalam jumlah RM210,000 dan memohon untuk pemulangan surat ikatan hak milik tersebut dan MOT daripada defendan kedua. Walau bagaimanapun, dokumen tidak dipulangkan kepada perayu. Pada 17 November 2004, perayu membuat pencarian di pejabat tanah dan mendapati bahawa pemilikan tanah tersebut telah dipindah milik dan

didaftarkan atas nama responden pertama pada 18 Mac 2001, enam minggu selepas perjanjian pinjaman telah ditandatangani pada 5 Februari 2001. Dalam tuntutannya, perayu memplid penipuan dan memohon ganti rugi terhadap responden pertama. Mahkamah Tinggi menolak tuntutan perayu dan memutuskan bahawa perayu gagal membuktikan penipuan terhadap responden pertama dan bahawa pindah milik pemilikan yang dilaksanakan oleh responden pertama bukan tindakan penipuan. Maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Responden pertama telah melaksanakan pindah milik dan pendaftaran pemilikan tanah kepada namanya sendiri lebih kurang enam minggu selepas tarikh pelaksanaan perjanjian pinjaman tersebut. Tindakan ini jelas kemungkiran perjanjian pinjaman dan secara terang tidak mempedulikan peruntukan dalam klausa 2 dan 4 perjanjian pinjaman, tanpa mempedulikannya sama ada perayu dalam kemungkiran tanggungjawabnya untuk membayar faedah untuk pembayaran pinjaman pada masa material. Ini adalah kerana responden pertama telah membenarkan perayu tempoh masa satu tahun untuk membayar pinjaman dan sementara itu, tiada pindah milik pemilikan tanah boleh dilaksanakan. Ini jelas menunjukkan penipuan dilakukan oleh responden pertama ke atas perayu. Adalah jelas bahawa pesuruhjaya kehakiman ('PK') telah tersilap dari segi undang-undang apabila beliau gagal untuk mempertimbangkan dan memutuskan bahawa responden pertama telah melakukan penipuan ke atas perayu apabila responden pertama menyebabkan pindah milik pemilikan tanah kepada dirinya sendiri secara pramatang (lihat perenggan 22).

(2) Dapatan PK, antara lain, bahawa perayu gagal untuk membuktikan bahawa dia telah membayar bayaran faedah kepada responden pertama atau yang dia telah membayar semula jumlah pinjaman terus kepada responden pertama, tetapi sebaliknya memutuskan yang wang tersebut dibayar kepada defendan kedua, tidak mengurangkan daripada fakta yang responden pertama tidak mempunyai hak atau asas undang-undang untuk melaksanakan pindah milik pemilikan tanah kepada dirinya sendiri sebelum tamat tempoh satu tahun. Pindah milik pemilikan awal tanah tersebut tidak dipertimbangkan langsung oleh PK dan oleh itu kesilapan undang-undang patut dibetulkan dengan campur tangan mahkamah rayuan (lihat perenggan 22).]

Notes

For Cases on friendly loan in general, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4782–4784.

Cases referred to

Kerry v Carter [1969] 1 WLR 1372, CA (refd)

Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals [2013] 2 MLJ 174, CA (refd)
Yong Tim v Hoo Kok Chong [2005] 3 CLJ 229, FC (folld)

Legislation referred to
Moneylenders Act 1951

Appeal from: Civil Suit No 22–315 of 2006 (High Court, Alor Setar)

Francis Nathar (Francis Nathar Nora Antoine & Co) for the appellant.
Lim Yang Yang (Yang Lim & Co) for the first respondent.

Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] By a written loan agreement (P2) entered into between the appellant/plaintiff and first respondent/first defendant on 5 February 2001, the first respondent agreed to lend the sum of RM100,000 as a friendly loan to the appellant. The loan sum was to be repaid within one year from 5 February 2001, the date of the loan agreement.

[2] As security for the loan the appellant deposited the original copy of the issue document of title of a piece of land, of which he was the registered owner, together with a memorandum of transfer duly signed by the appellant and the first respondent with the second defendant, the solicitor appointed to conduct the loan transaction. A caveat was lodged by the first respondent on the title on 10 February 2001 as agreed between the parties.

[3] Pursuant to cll 2 and 4 of the loan agreement, it was agreed between the appellant and the first respondent that the memorandum of transfer and the title deed would not be presented for registration of change of ownership of the land unless the appellant failed to repay the said loan 'within 1 year with effect from the date of this Agreement'.

[4] Although the loan was referred to as a friendly loan in the loan agreement, from the evidence it was clear that the loan was far from friendly as the appellant had to pay interest at 3% per month on the loan sum to the first respondent.

[5] Before the expiry of the one year period, the appellant requested the first respondent through the second defendant, for an extension of time of another year to settle the loan sum.

[6] Although it was an agreed fact that the first respondent had extended another loan sum of RM35,000 to the appellant on 3 April 2001, the appellant had pleaded in para 8 of his statement of claim that he had in fact between 3 April 2001 and 11 May 2001 borrowed a total sum of RM60,000 from the first respondent by way of three separate loans with interest payable at the same rate.

[7] The appellant in evidence stated that he had paid all the monthly interest payments in cash to the first respondent personally and that the total principal loan sum of RM160,000 and overdue interest in the sum of RM50,000 were repaid by way of three cheques through the second defendant. The said cheques were issued by the appellant's wife, Ng Bee Bee (PW2) on 18 December 2002.

[8] Upon the repayment of the sum of RM210,000 the appellant requested the second defendant for the return of the title deed and the memorandum of transfer. However, the second defendant failed to return the documents to the appellant.

[9] On 17 November 2004 the appellant made a search at the land office and discovered to his surprise that ownership of the said land had been transferred to and registered in the name of the first respondent on 18 March 2001 that is, about six weeks after the loan agreement had been signed on 5 February 2001.

[10] In para 20 of his statement of claim, the appellant had pleaded fraud against the first respondent and set out the particulars of fraud as follows:

(a) transferring the said land into his name on 18 march 2001, less than 6 weeks after the date of the said loan agreement although the plaintiff had one year to settle the said loan;

(b) concealing at all material times from the plaintiff the fact that he had registered the said land in his name;

(c) continuing to collect interest from the plaintiff after registering the said land in his name;

(d) transferring the said land to his name although he knew fully well that it was a breach of the terms of the said agreement; and

(e) colluding with the Second defendant to cheat the plaintiff.

In para 24 of the statement of claim the appellant prayed for, inter alia, an order that the said land be returned to him or alternatively for an order that the first respondent pay damages.

[11] In this claim, the appellant had only proceeded against the first respondent as the second defendant had failed to enter his appearance and a *Perakuan Ketidakhadiran* had been filed on 7 December 2008.

[12] The first respondent in his evidence denied receiving any interest sums nor the principal loan sum of RM160,000 from the appellant. The first respondent also denied any knowledge of the alleged payment of the sum of RM210,000 by the appellant to the second defendant on 18 December 2002. The first respondent stressed that the second defendant was not his solicitor as the second defendant had been appointed by the appellant and that the second defendant did not act as a stakeholder for him.

[13] The first respondent also stated in evidence that he had not received the letter from the appellant requesting for an extension of time to repay the loan after the expiry of the first year and thus had not agreed to an extension of time.

[14] Importantly, the first respondent said that he had been informed by the second defendant that after the loan was given and after the loan agreement had been signed the transfer of ownership of the appellant's land could be carried out.

DECISION OF THE HIGH COURT

[15] The learned judicial commissioner in her judgment made the following findings of fact:

(a) the appellant had failed to prove payment of interest and the repayment of the principal loan sum of RM160,000 to the first respondent;

(b) the payment said to have been made by the appellant on 18 February 2002 was paid to the second defendant and not the first respondent and that the first respondent had no knowledge of the transaction;

(c) the receipt issued by the second defendant for the sum of RM160,000 was for 'legal fee and disbursement';

(d) the first respondent did not receive the letter from the appellant requesting for an extension of time and that the first respondent had not agreed to such an extension; and

(e) the first respondent was informed by the second defendant that if the appellant failed to make payment, he could effect the transfer of the ownership of the land ('Bagi D1 tiada bayaran dibuat dan beliau diberitahu pindah milik boleh dilakukan').

[16] The learned judicial commissioner went on to hold that the appellant had failed to prove fraud against the first respondent and dismissed the claim with costs. Importantly, the learned judicial commissioner in her judgment held that the transfer of ownership effected by the first respondent was not a fraudulent act.

DECISION OF THE COURT OF APPEAL

[17] Upon reading the record of appeal, the written submissions of the counsel for the appellant and the first respondent and upon hearing the oral submission of counsel aforesaid, this court allowed the appeal with costs.

[18] Being dissatisfied with the decision of the court the first respondent now applies for leave to appeal to the Federal Court.

GROUNDS OF DECISION

[19] Clauses 2 and 4 of the loan agreement clearly provide that the appellant had a period of one year to repay the loan and that if the appellant was in breach of the agreement after the period of one year only then could the first respondent have the right to effect the transfer of ownership of the land to himself. In the present case, it is an undisputed fact that the first respondent had effected the transfer and registration of ownership of the land into his own name on 18 March 2001, that is, just about six weeks after the date of execution of the loan agreement. This act clearly was in breach of the loan agreement and in blatant disregard of the provisions in cll 2 and 4, regardless of whether the appellant was in breach of his obligation to pay interest to service the loan at the material time. This is simply because the first respondent had allowed the appellant a period of one year to repay the loan and that in the meantime, no transfer of ownership of the land could be effected. This clearly demonstrated a fraud perpetrated by the first respondent on the appellant.

[20] The first respondent in his evidence sought refuge by saying that he was told by the second defendant that he could effect the transfer after the loan agreement had been signed and after the loan was disbursed. But this evidence clearly flies in the face of the terms of the loan agreement. There was no issue of the first respondent not being able to understand the terms of the loan agreement, in particular cll 2 and 4, or that the clauses did not apply to him.

[21] Whether the loan transaction, said to be a friendly loan in the loan agreement, was in breach of the Moneylenders Act 1951 (Revised 1989) (as it was adduced in evidence that interest was payable on the loan sum) is not an issue as the appellant did not plead in his statement of claim of any contravention of the Act or that the transaction was illegal.

[22] The findings of the learned judicial commissioner, inter alia, that the appellant had failed to prove that he had paid the interest payments to the first respondent or that he had repaid the loan sum of RM160,000 to the first respondent directly, but instead had held that the money was paid to the

second defendant, do not detract from the fact that the first respondent had no right or legal basis to effect the transfer of ownership of the land to himself on 18 March 2001 before the expiry of the one year period. The early transfer of the ownership of the land was not considered at all by the learned JC and was accordingly an error of law which error had to be corrected by appellate intervention. In *Kerry v Carter* [1969] 1 WLR 1372 at 1376 Lord Denning MR held that the Court of Appeal will interfere 'where the judge has gone wrong on principle or is shown to have misapprehended the facts; but, even if neither is shown, we will interfere if we are of opinion that the judge was clearly wrong'. *Kerry v Carter* was followed by His Lordship Jeffrey Tan FCJ recently when delivering the judgment of the Court of Appeal in *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174.

In the present case, it is obvious that the learned judicial commissioner had erred in law when she failed to consider and hold that the first respondent had perpetrated a fraud on the appellant when the first respondent caused the transfer of ownership of the land to himself prematurely.

[23] The court is mindful of the decision of the Federal Court in the case of *Yong Tim v Hoo Kok Chong* [2005] 3 CLJ 229 where it was held that fraud alleged in a civil case must be proved beyond reasonable doubt. In this case, the court is of the view that the appellant has proven fraud against the first respondent beyond reasonable doubt when the *Catatan Carian Persendirian* (P12) was admitted in evidence to prove that the ownership of the land had in fact been transferred from the appellant to the first respondent on 18 March 2001 at 2.33pm.

[24] If the first respondent had elected, after the expiry of one year from the date of the loan agreement and in the face of any breach by the appellant, to effect the transfer instead of commencing legal action against the appellant then of course the appellant would have no basis to complain in light of cl 4 of the loan agreement.

CONCLUSION

[25] In the result this court allowed the appeal with damages to be assessed by the learned senior assistant registrar of the High Court as at the date of judgment and with costs of RM30,000 here and below.

Appeal allowed.

Reported by Afiq Mohamad Noor